IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 193 OF 2003.

Dhiren C.Tolani,
Age: 33 years, Occ.: Buasiness,
Indian Inhabitant having his
office at 1 & 2, Sai Sadan,
Ground floor, 37th Road, Plot
No.519, TPS III, Bandra (West),
Mumbai 400 050. .... Petitioner
(Org.Complainant)

Versus.

1. Shailesh Ramnik Mehta,
   Age: Adult, Occ.: Business,
   residing at C/3, Tirth
   Apartment, Near Parimal Garden,
   Ahmedabad 380 006, Gujarat.
2. The State of Maharasthra. .... Respondents.

Shri M.S.Mohite for the Petitioner.
Shri Subhash Jha along with Shri G.D.Upadhya i/by
Ms.Neeta Parekh for the Respondent No.1.
Ms.Rajashree Gadhvi, A.P.P. for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 27th October, 2005.

ORAL JUDGMENT.

1. Submissions of the learned Counsel appearing for the parties were heard on the last date.

2. Challenge in this petition under Article 227 of the Constitution of India is to the Judgment and Order dated 16th September 2002 passed by the Chief Judicial Magistrate, Thane. The Petitioner is the complainant in

a private complaint under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the said Act of 1881"). On a complaint filed by the Petitioner process was issued by the learned Magistrate. The Respondents No.1 preferred an application at Exh.46 for recalling the order issuing process. The said application came to be rejected on 18th January 2002. A second application at Exh.53 was made by the Respondent No.1 for recalling the order issuing process. By the impugned order, the learned Chief Judicial Magistrate directed that the order issuing process as against the Accused No.3 i.e. Respondent No.1 herein stands recalled.

3. Shri Mohite the learned Counsel appearing for the Petitioner relied upon the decision of the Apex Court reported in 2004(7) S.C. page 388 (Adalat Prasad v/s. Rooplal Jindal and ors.) as well as another decision of the Apex Court reported in 2005(1) Mah.L.J. page 626 (Subramanium Sethuraman v/s. State of Maharashtra). He submitted that in the said decisions, the Apex Court has taken a view that the law laid down by the Apex in its earlier judgment reported in AIR 1992 SC page 2206 (K.M.Mathew v/s. State of Kerala & others) is no longer a good law. He pointed out that the Apex

Court has held that the learned Magistrate had no power to recall the order issuing the process. He, therefore, submitted that the impugned order deserves to be quashed and set aside.

4. Shri Subhash Jha the learned Counsel appearing for the Respondent No.1 placed reliance on a decision of this Court in Criminal Writ Petition No.444 of 2005 dated 23rd August 2005 (S.P.Capital Finance Ltd. v/s. State of Maharashtra and others). He submitted that the learned Single Judge has held that the decision of the Apex Court in the case of Adalat Prasad does not indicate directly or indirectly that the decision would operate retrospectively and hence the decision cannot be made applicable to the cases which were decided before the decision in the case of Adalat Prasad. He submitted that the decision of the Apex Court in the case of Adalat Prasad will not apply retrospectively and it will have only a prospective operation. He submitted that on the basis of the decision of the Apex Court in the case of Adalat Prasad, the orders which were passed earlier cannot be reopened. He placed reliance on the decision of the Apex Court reported in 1999(3) S.C.C. page 362 (Baburam v/s. C.C.Jacob and others).

5. I have considered the submissions. It will be necessary to refer to the decision of the learned Single Judge of this Court in the case of S.P.Capital Finance Ltd.(supra). The learned Single Judge in paragraph 3 of the said decision has observed thus:

> "The learned Magistrate recalled the process on 24.4.2004. In view of the decision in the case of K.M.Mathew, the learned Magistrate on 24.4.2004 had power to recall the process, which power he has exercised. No fault can be found with the learned Magistrate in exercising the power which he had at that time to recall the process. Nothing has been indicated either directly or indirectly in the case of Adalat Prasad that the decision would operate retrospectively and hence, the decision would have to be made applicable to cases which were decided before the decision in the case of Adalat Prasad. Thus, the only question which remains to be examined by the Sessions Court is whether the material was such that the learned Magistrate could have recalled the process or not and whether the process was rightly issued. These are the only aspects which have to be

taken into consideration by the Court before whom the order of the learned Magistrate dated 24.4.2004 is challenged."

6. A reference will have to be made to a decision of the Apex Court reported in (2003) 7 S.C.C. 517 (M.A.Murthy v/s. State of Karnataka and others). The ratio of the said decision is found in paragraph 8 thereof, which reads as under:

"The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C.Golak Nath v/s. State of Punjab. In Managing Director, ECIL v. B.Karunakar the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law

declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U.P. and Baburam v. C.C.Jacob). **It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling.** The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in Ashok Kumar Sharma Case No.II. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no

> judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside." (Emphasis supplied).

Thus the law on the point appears to be very clear as is reflected from the decision of the Apex Court in the case of M.A.Murthy. In the said decision, the Apex Court reiterated the law which is laid down in the earlier decision reported in 1999(3) S.C.C. 362 (Ashok Kumar Gupta v. State of U.P.) and also in the decision in the case of Baburam (supra) on which reliance is placed by Shri Subhash Jha appearing for the Respondent No.1. Pronouncement of law made by the Apex Court is that there shall be no prospective overruling, unless it is so indicated in the decision. The Apex Court held that it is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling unless it is so indicated in the particular decision. It is for the Apex Court to indicate whether a particular decision will apply prospectively. On a

plain reading of the decision of the Apex Court in the cases of Subramaniam (supra) and Adalat Prasad (supra), it is apparent that no such direction has been given by the Apex Court. Thus the law laid down in the said decisions is the law from the inception.

7. Reliance placed by the learned Counsel appearing for the Respondent No.1 on the decision in the case of Baburam (supra) will not help the Respondent No.1 as the Apex Court was considering its earlier decision reported in (1995) 2 S.C.C. page 745 (R.K.Sabharwal v. State of Punjab) wherein the Apex Court has clearly clarified that the interpretation given by the Apex Court to the working of the roster and their findings on this point shall be operative prospectively. Therefore, it is obvious that the law laid down in the case of Adalat Prasad and Subramaniam cannot he held to be only prospective in operation. In view of the clear pronouncement of law by the Apex Court, the decision in the case of S.P.Capital Finance Ltd. (supra) by the learned Single Judge cannot be read as laying down law that the decision of the Apex Court in the case of Adalat Prasad will apply only prospectively. It is also pertinent to note that the decision of the Apex Court in M.A.Murthy (supra) was not brought to the notice of the

learned Single Judge and hence the said decision of the learned Single Judge cannot be said to be a binding precedent laying down proposition of law that the decision of Adalat Prasad will apply only prospectively and will not apply to the orders which are already passed.

8. Thus the impugned order will have to be set aside being contrary to the law laid down by the Apex Court in the case of Adalat Prasad (supra). Hence the impugned order deserves to be quashed and set aside. It must be clarified here that this Judgment will not prevent the Respondent No.1 from challenging the order issuing process by filing appropriate proceedings. If such proceedings are filed, it is obvious that the concerned Court will take into consideration the pendency of the earlier application and pendency of the present petition in this Court while considering the prayer for condonation of delay.

9. Accordingly, the following order is passed:

(i) The impugned order dated 16th September 2002 is quashed and set aside and the Application at Exh.53 stands rejected.

(ii) This order will not preclude the Respondent No.1 from adopting appropriate proceedings for challenging the order issuing process in accordance with the law.

(iii) All contentions of the parties on merits are expressly kept open.

Judge.